

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )  
 )  
 Plaintiff, ) Case No. CV 17-70  
 ) Green Bay, Wisconsin  
 vs. )  
 ) June 18. 2021  
 WAL-MART STORES EAST LP, ) 1:31 p.m.  
 )  
 Defendant. )  
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**TRANSCRIPT OF FINAL PRETRIAL CONFERENCE**  
BEFORE THE HONORABLE WILLIAM C. GRIESBACH  
UNITED STATES SENIOR DISTRICT JUDGE

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## TRANSCRIPT OF PROCEEDINGS

## Transcribed From Audio Recording

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THE COURT: Be seated.

5 THE CLERK: The Court calls Case No. 17-CV-70, *Equal*  
6 *Employment Opportunity Commission vs. Wal-Mart Stores East, LP*  
7 for a final pretrial conference. May I have the appearances,  
8 please?

9 MS. VANCE: Good afternoon. Attorney Carrie Vance for  
10 the Equal Employment Opportunity Commission.

11 MS. CARTER: Attorney Leslie Carter for the Equal  
12 Employment Opportunity Commission.

13 MR. MULAIRO: And Justin Mulaire, also for the EEOC.

14 THE COURT: Okay. Good afternoon.

15 MR. HARLAN: Good afternoon, Your Honor. Emery Harlan  
16 on behalf of Walmart.

17 MR. BULIOX: Government noon as well, Your Honor.  
18 Warren Buliox on behalf of Walmart.

19 MR BURNETT: And George Burnett, Your Honor, on behalf  
20 of Walmart.

THE COURT: All right. Well, good afternoon, all.

22 Well, number 1, if you wish you may remove your masks.  
23 You don't have to, but you may. You know each other. You  
24 probably came up here in the same car.

25 || (General laughter.)

1           THE COURT: And you're probably all vaccinated.

2           UNIDENTIFIED SPEAKER: Yes.

3           THE COURT: I think we're looking for July 7th for  
4 the -- or July 4th for the general lifting of the mandate  
5 overall. And it would be nice to get rid of some of our  
6 plexiglass, too. It does have a certain glare to it. But  
7 anyhow, that's yet to come.

8           You're scheduled for trial beginning --

9           THE CLERK: July 12th.

10          THE COURT: -- July 12th. And we're planning on going  
11 to trial. There's not a criminal case that will bump you that I  
12 know of. So if everybody is in reasonably decent health we'll  
13 go forward.

14          I plan on probably, for a trial this length, probably  
15 an eight-person jury. Means we have eight. If we lose a couple  
16 we're still good. But that's typically the way I would work  
17 that.

18          I think it probably makes sense to address your  
19 motions in limine and then do housekeeping matters. Any problem  
20 with going forward in that fashion?

21          MR. HARLAN: No, Your Honor.

22          MS. VANCE: No, Your Honor.

23          THE COURT: Okay. So first, starting with Plaintiff  
24 EEOC's motion:

25           **"Walmart should be barred from arguing that other**

1       **employees with developmental disabilities worked in the store**  
2       **and were not discriminated against."**

3           I'm going to deny that motion. I understand that  
4       that's not a dispositive. That's not, you know, conclusive.  
5       It's obviously possible not to discriminate against members of a  
6       class and still discriminate against the particular plaintiff  
7       involved.

8           But if the argument in the claim is essentially that  
9       Walmart discriminated against persons with disabilities, and in  
10      particular a person with Down syndrome, and there's other people  
11      with similar disabilities working for Walmart, I think it's  
12      relevant. It's not, as I said, not conclusive, and certainly  
13      EEOC is free to argue and cross-examine concerning any  
14      witnesses. But I'm not going to deny Walmart from showing that  
15      kind of -- or presenting that kind of evidence.

16        **"Walmart witnesses should be barred from offering**  
17       **speculation and lay opinion testimony regarding the needs of**  
18       **Marlo Spaeth, an individual with Down syndrome."**

19           I'm going to deny that. They can't speculate.  
20       Obviously speculation is not evidence and witnesses aren't  
21       allowed to speculate. But I imagine -- or assume let me say --  
22       assume that witnesses that interacted with Ms. Spaeth in the  
23       course of her employment would have testimony to offer  
24       concerning her request for help, or her response when she was  
25       given directions in response to customers asking questions, that

1 sort of thing would be admissible. Her reaction to supervisors.  
2 Much of that would be factual testimony. But then there's also  
3 room for lay testimony in this area. I think that's where  
4 there's, you know, some discretion.

5           But I think lay people are in a position to give  
6 opinions on with respect to other individuals with whom they  
7 interact, not so much what they understood, maybe what was  
8 indicated or what was said to them.

9           I think some of this is impossible to rule ahead of  
10 time. And so let me preface all of these with the  
11 acknowledgement that a motion in limine gets you a ruling in  
12 limine. It's not a final ruling. And circumstances can change,  
13 too.

14           So if, in fact, it appears that some of what I ruled  
15 inadmissible now, if there's a door opened or now the context --  
16 feel free to bring that to my attention outside the presence of  
17 the jury. We'll address it at that point and then go from  
18 there.

19           And likewise, anything that I've denied -- in other  
20 words, barring testimony, if something comes up where it's being  
21 explored in ways that you feel are unfair or prejudicial, I  
22 recognize that these are fluid situations. So number 3:

23           **"Holding that the EEOC does not need to enter evidence**  
24 **relating to jurisdictional prerequisites where Walmart has**  
25 **admitted such prerequisites were satisfied."**

1           That's, of course, granted. Walmart does not dispute  
2 that. I don't think we want to talk about the number of  
3 employees, or interstate commerce, or all of that if we don't  
4 have to.

5           **"4. Allowing EEOC to introduce certain deposition  
6 testimony in its case-in-chief."**

7           You know, we have a local rule that I've never  
8 understood that says you're limited to what, five pages? That  
9 doesn't make sense to me. So don't -- but you have to tell each  
10 other. You have to reveal the excerpts that you wish to  
11 present. And then I deal with the objections to those excerpts.

12           I can't rule in the abstract that deposition testimony  
13 is going to be permitted unless I know specifically what  
14 testimony is being offered and then what the objections are. So  
15 I'll deny that.

16           But I think you ought to present each other with those  
17 deposition excerpts that you intend to introduce. And then the  
18 other side then, if you reach agreement, wonderful, I don't need  
19 to hear anything about it. And if you want to bore a jury with  
20 an hour of it, that's fine. If it gets carried away I may  
21 interrupt. But, I mean, really, I think the rule of five pages  
22 is unreasonable given the nature of cases.

23           On the other hand, there's a natural inclination, I  
24 think most experienced attorneys know that they want to limit  
25 that as much as they can because they don't want to bore the

1 jury.

2           And so I'll leave that to you. But if there are  
3 disputes, if there are objections to the testimony, if you would  
4 present those at least a week ahead of time or a week and a half  
5 ahead of time before trial, then I'll be in a position to give  
6 you rulings. If this is a videotape deposition you'll need  
7 editing and I'd suggest you move quickly then. If it's just  
8 transcript I can give you that much more easily and quickly.

9           So that's -- you know, that's a denial of the motion  
10 just to introduce without it being identified and the other side  
11 being given an opportunity to object.

12           MS. VANCE: Your Honor, may I address that quickly?

13           THE COURT: Sure.

14           MS. VANCE: We did file with our pretrial report our  
15 deposition designations that we are referring to in motion in  
16 limine 4.

17           THE COURT: Okay. Then Walmart, if you have any  
18 objections, notify -- first of all, you know, see if you can  
19 work them out. If not, let me know what they are and we can  
20 either get something in writing or get you on the phone or  
21 something next week or the week after to let you know where  
22 those are, rulings on those. Okay.

23           **"Excluding evidence of and argument about past**  
24 **financial difficulties, related --"**

25           This is the bad checks issue. That's very remote.

1 And I have a pretty good understanding of how bad check cases  
2 work. A check goes in that's insufficient funds, the store  
3 gives a notice. If it's not cured in a certain time, it goes to  
4 the DA, they issue it as a criminal. They eventually drop them  
5 if there's restitution or allow an ordinance violation.

6 I think that this is so remote and the circumstances  
7 are such that I don't think this -- I think the possibility of  
8 unfair prejudice outweighs any probative value it has. So I'm  
9 going to exclude the evidence of her bad checks. It's not  
10 even -- to me these cases aren't even clear there's a crime,  
11 especially when it ends up as an ordinance violation and just a  
12 restitution or small fine. And then it's so long ago.

13 Again, that's a motion in limine. I'm not exactly  
14 clear on how Ms. Stevenson's testimony will impact here. I know  
15 Walmart views her as a key witness testifying to certain  
16 responses made by Walmart employees that they deny having made.  
17 You know, if that happens and we see some of this, we can take  
18 another look at it, but my inclination is this is just too  
19 remote. She's not a party -- well, she is a party, but it's  
20 really the EEOC and the plaintiff is Ms. Spaeth, at least a  
21 party in interest more than her representative. So I'm going to  
22 exclude that.

23 MS. VANCE: Thank you, Your Honor.

24 THE COURT: And partly based on the remoteness, but I  
25 think especially the unfair prejudice I think outweighs the

1 probative value here. That's subject to re-evaluation as the  
2 case goes. Okay.

3                   **"Excluding testimony and argument as to whether one**  
4 **witness believes another."**

5                   That's -- there's no opposition because that's an  
6 obvious rule of evidence. We don't allow witnesses to assess  
7 credibility of other witnesses. That's the jury's function.

8                   **"7. Excluding evidence relating to any previously**  
9 **undisclosed witness or documents."**

10                  It's kind of in the rules already, subject to the  
11 exceptions of late notice or rebuttal. And so, subject to those  
12 exceptions. If you have a witness you're going to call who  
13 hasn't been disclosed, or a document, show it to the other side.  
14 If there's a dispute, bring it to my attention, we'll rule on it  
15 as it goes.

16                  Obviously the key is, was there cause for the late  
17 notice? Is there prejudice? Things like that. So those will  
18 govern that. So I'm not going to enter a blanket exclusion  
19 other than to note that the rules, you know, clearly prohibit  
20 sandbagging and surprises and bushwhacking, that sort of thing.  
21 So, number 8:

22                  **"Barring Walmart from making disparaging remarks about**  
23 **the EEOC or its position as a federal agency."**

24                  Let's see, Walmart versus the government. Both have  
25 people in the world that don't like them. And both have people

1       in the world that think they're the greatest thing since sliced  
2       bread. I think -- I have difficulty trying to edit your closing  
3       arguments. I expect civility. And again there's -- one of the  
4       times -- I had a closing argument once where I just laid there  
5       and I felt bad because I let the defense attorney just go on  
6       something terrible. And it was beyond -- I should have  
7       intervened, but I didn't. And the jury was out and they came  
8       back with a question before they came back with their verdict.  
9       They wanted to know if they could award costs and attorneys'  
10      fees to the other side.

11           And I say that because, again, you know, the penalty  
12      for being uncivil or rude, jurors see that. And I think this is  
13      one of those things where a argument over the claim or the  
14      argument, a criticism of someone's argument can so easily be  
15      interpreted as a cast of aspersions upon your honor and  
16      integrity. Avoid the honor and integrity part. Do battle with  
17      each other's arguments and I think we'll be fine.

18           I'm not going to enter a ruling on that one. I'm  
19      going to deny the motion with the understanding that if you  
20      believe that the arguments are improper, let me know. I  
21      recognize the need to ensure civility and I'll certainly enforce  
22      those rules. Let's see.

23           **"9. Restricting evidence relating to the issues of  
24      equitable relief such as back pay, reinstatement or front pay in  
25      lieu of reinstatement, lost benefits, tax offset, mitigation and**

1       **injunctive relief to be addressed to the Court alone or by**  
2       **post-trial briefing."**

3                  Yeah, I think that makes some sense. I mean, I always  
4       thought of back pay as part of damages, and I think a lot of  
5       attorneys just try cases with that in mind. But after looking  
6       at the citation and following up on some of the research that  
7       was provided, it's clear to me that back pay is separate from  
8       the damages here. And it's part of equitable relief. It's  
9       clearly to be determined by the Court.

10                 Now, you know, if there's no liability and no damages  
11       awarded, then we're not going to get into back pay anyhow so  
12       that makes it go away. This is partly what Walmart would like  
13       to do is bifurcate damages entirely. We'll get to that.

14                 But I think this part of damages are bifurcated by  
15       virtue of the fact that this is equitable relief, injunctive  
16       back pay that's considered equitable relief under the caselaw.  
17       And so it's something that the Court decides.

18                 And Walmart has suggested it could be done by  
19       affidavit. I think that's probably reasonable. But if Walmart  
20       believes that affidavit doesn't do it, they can have a trial to  
21       the Court or a hearing on equitable relief. In other words, if  
22       Walmart takes a pay scale and multiplies it out, the hours, and  
23       Walmart -- I mean EEOC does that, the plaintiff does that and  
24       comes up with a calculation of back pay and Walmart disagrees,  
25       I'll certainly hear evidence on that.

1           But it is a matter of equitable relief under the  
2 caselaw as I see it now. And the case that you cited where  
3 Judge Sykes affirmed the trial court's handling of that issue I  
4 thought was pretty right on point. And when looking closely at  
5 the statute, I see where you're coming from. So I'm going to  
6 grant that. Yup. Go ahead, Mr. --

7           MR. HARLAN: Your Honor, I just want to clarify one  
8 thing. So does that mean that we can't put in evidence  
9 regarding lack of Ms. Spaeth's seeking new employment? So that  
10 issue it seems to me would be relevant to the question of  
11 whether, you know, in terms of whether she has sought new  
12 employment in terms of what her real motivation was for not  
13 following the attendance policy.

14           THE COURT: No, I think -- to the extent -- well, one  
15 is mitigation can be addressed. If there's a failure to  
16 mitigate damages that can be addressed in the hearing before the  
17 Court on back pay. But if your argument, if I understand it  
18 correctly, Mr. Harlan, is that it also goes to the liability.

19           MR. HARLAN: Yes.

20           THE COURT: You feel free to introduce that evidence  
21 as part of liability. I don't think there's any -- here again,  
22 there's some of a shifting. My hunch is if we get past -- if  
23 the jury finds liability, my sense is that back pay, the amount  
24 of back pay is not going to be the big issue here. But it might  
25 be. I'm certainly willing to concede that.

1           But if the lack of any effort to seek other  
2 alternative employment is part of your argument that she wasn't  
3 a qualified person with a disability or wasn't interested,  
4 didn't desire to work, something like that, that would be  
5 admissible it seems to me.

6           MR. HARLAN: Thank you.

7           THE COURT: Yeah. Okay. And then:

8           **"Allowing the EEOC to use leading questions during**  
9 **direct examination of witnesses with intellectual disabilities**  
10 **and ensuring cross-examinations --"**

11           That's a wait and see. It seems to me that if we can  
12 do with the proper open-ended questions, fine. If it becomes  
13 clear that that's not possible, that in order for the witness to  
14 testify, to respond, you have to do the other. And I note I  
15 think EEOC wanted to do perhaps a voir dire. You wanted a  
16 determination of competency.

17           MR. HARLAN: That was us.

18           THE COURT: Okay, Walmart wanted to do a voir dire  
19 perhaps of Ms. Spaeth --

20           MR. HARLAN: Yes.

21           THE COURT: -- to see if she understands the  
22 difference between -- to see where that goes.

23           And I think we can do that outside the presence of the  
24 jury before she testifies. And I've done, you know, cases with  
25 very young children testifying and we've done that sort of

1       thing. So if -- you know, it doesn't -- it does seem to me that  
2       the question is -- and this is something you might want to look  
3       at, and I'll look at it more closely.

4           Even a witness who, for example, the oath, they don't  
5       understand the oath, they don't understand the difference  
6       between truth and falsehood, I don't know if it -- is there an  
7       argument to be made that nevertheless that their presence is  
8       evidence or their responses are evidence even if it's not  
9       typically under oath?

10          I don't know if there's an argument like that or  
11       however you want to look at it. But I have no idea how  
12       functional Ms. Spaeth is at this point. I know there's an  
13       argument of whether she suffers from dementia, whether it's  
14       depression. It sounds like she has had some declines. It's  
15       been what now, five, six years since she was employed at  
16       Walmart. Two since the case was started. COVID obviously  
17       delayed things quite a bit, as well as some of the complexity.  
18       But, yup, anything on that?

19           MS. VANCE: Yes, Your Honor, if I may.

20          We are -- the EEOC is not asking for an in-camera  
21       review. And competency has not been any issue in this case.

22          Walmart deposed Ms. Spaeth under oath for about 10  
23       hours and then asked for a second day of deposition and put her  
24       under oath for a second day. There was no question at the time  
25       that that was sworn testimony, that she was under oath. And

1 then Walmart in its own pretrial report mentioned it.

2 Competency of Ms. Spaeth is not an issue for them.

3 And so, you know, bringing it back to our motion --

4 well --

5 THE COURT: We're not going to -- we're not going to  
6 have like a psychological evaluation of her or anything like  
7 that, but my understanding is that she needs to take an oath.

8 MS. VANCE: Right. Yes, Your Honor, as she has.

9 THE COURT: Testimony has to be given under oath. And  
10 is it your position that whether she understands the oath,  
11 whether she understands the difference between telling the truth  
12 or telling a lie it doesn't make any difference? She still  
13 testifies even if she doesn't understand the meaning of the  
14 oath? Because that's what I view as the competence issue that  
15 the Court would decide.

16 And again, I'd go back to a child, a very young child  
17 who doesn't understand the difference between the truth and a  
18 lie in, you know, a sexual assault cases in state court is what  
19 I'm thinking. It would not be uncommon to begin the  
20 presentation of that witness by making a record that they  
21 understand the difference between the truth and the lie. And as  
22 long as they understand the difference, I think they can  
23 testify.

24 Now, the oath, you know, plays a different role there.  
25 But that's the key thing. The witness needs to understand the

1 difference between telling the truth and telling of a lie. And  
2 as long as this witness understands that, it seems to me clearly  
3 they're competent to testify. That's not a long voir dire.  
4 It's usually a couple of questions. And it can be outside the  
5 presence of the jury if you think it would be prejudicial, or it  
6 could be in the presence of the jury. Typically in the cases in  
7 which I've seen that done with young child witnesses, it's done  
8 in the presence of the jury so the jury understands this person  
9 knows the difference and that they can put some confidence in  
10 that testimony. They can trust -- consider it trustworthy at  
11 least to the extent that the witness understands the difference  
12 between a lie and telling the truth and a lie. But we can look  
13 at that more closely.

14 MS. VANCE: Yes, Your Honor. I mean, in general, our  
15 position is that this trial can proceed under the rules as it  
16 would, and that was part of Motion in Limine 10 pointing out  
17 that the rule does allow, even on direct, for leading questions  
18 if it's necessary.

19 THE COURT: Yeah. And we'll see if that's necessary.  
20 Yup. Okay. So those are Walmart's motions. Anything else on  
21 that?

22 MS. VANCE: Yes, Your Honor. The second part of that  
23 EEOC's Motion in Limine 10 was about cross-examination using  
24 documents.

25 THE COURT: Uh-huh. Again, I don't know -- you know,

1 it seems to me we're going to have to go document by document.  
2 If there's a question of documents I'm not going to blanketly  
3 prohibit it or allow it. I just want to -- let's see what  
4 happens.

5 MS. VANCE: So, Your Honor --

6 THE COURT: I don't see that as prejudicial. And I  
7 don't feel I'm in a position to rule ahead of time on that until  
8 I see this witness or see the documents or understand how this  
9 is intended to work.

10 MS. VANCE: Could we propose, Your Honor, that part of  
11 presenting the document to the witness would be having the  
12 witness read from the document so that we at least establish a  
13 foundation of literacy of the words in the document, the  
14 content?

15 THE COURT: Mr. Harlan, what's your view on that, or  
16 Mr. Buliox?

17 MR. HARLAN: Your Honor, I think your approach is the  
18 appropriate one which is to see what happens at trial. I  
19 haven't even figured out what documents, if Ms. Spaeth  
20 testifies, they're going to show her. So I think it's premature  
21 to try to say for a particular document we may be showing to her  
22 just to say can you recognize your signature. I mean, I just  
23 don't know. I think it's not appropriate at this point to try  
24 to figure out what's going to happen. If she gets on the stand  
25 and testifies, then --

1           THE COURT: A witness who says I don't recognize a  
2 document, I mean, obviously the first step in introducing a  
3 document through a witness is showing the document to the  
4 witness, asking them do you recognize the document, asking them  
5 what it is. If the witness can't even testify to that, the  
6 document doesn't come in through that witness.

7           So I think there's automatic safeguards in the  
8 requirement that a foundation be laid before a witness is  
9 introduced -- or a document is introduced through any witness.  
10 So I think that's -- these aren't the kinds of things either  
11 that would prejudice a jury. That's why I don't think it's so  
12 important that we nail it down at this point.

13           MR. HARLAN: To give the EEOC some comfort, based on  
14 our deposition, we don't plan on showing her a bunch of policies  
15 and records and that sort of thing and asking her to testify  
16 about those things.

17           THE COURT: Okay.

18           MR. HARLAN: I don't think that's going to be  
19 productive. And frankly, I don't think it's going to make us  
20 look good in front of the jury. So we're not going to be trying  
21 to catch her by showing her a bunch of documents and say, hey,  
22 you know, do you agree that this was putting you on notice that  
23 you were violating an attendance policy. That's not where we're  
24 going.

25           THE COURT: Okay. Let's go to Walmart's, then,

1 motions.

2           **"1. The Court should prohibit evidence pertaining to**  
3 **the EEOC's internal determination."**

4           I don't perceive any objection to that other than  
5 jurisdictional requirements which are stipulated to. So that  
6 determination is not admissible. It's not the one that matters  
7 in this proceeding. So I'll grant number 1.

8           MS. VANCE: Can we have one second, Your Honor?

9           THE COURT: Uh-huh. This is document 185, page 2.

10          MS. VANCE: Thank you.

11          THE COURT: Yeah.

12          MS. VANCE: Thank you.

13          THE COURT: Uh-huh. Okay. I don't think -- if I  
14 recall correctly that wasn't really objected to. Number 2 is:

15           **"Evidence about other cases or claims of**  
16 **discrimination involving Walmart should also be barred."**

17          That's granted. Of course, again, subject to the door  
18 not being opened or -- you know, and if you feel the door is  
19 opened you can again ask that we revisit that.

20          MS. VANCE: And, Your Honor, may I speak to that?

21          THE COURT: Yup.

22          MS. VANCE: And we had asked for the carveout that  
23 during what may be post-trial briefing on equitable relief.

24          THE COURT: Yeah, this is just for trial purposes.

25          MS. VANCE: Got it.

1           THE COURT: I do these motions as addressing what's  
2 admissible at trial in front of a jury.

3           Okay. So I recognize that if EEOC prevails they may  
4 wish to introduce other evidence for purposes of injunctive  
5 relief or other equitable relief.

6           MS. VANCE: Yes, Your Honor.

7           THE COURT: **"3. The Court should preclude testimony**  
8 **and argument to the effect that supposed violations of Walmart's**  
9 **internal anti-discrimination policies means Walmart**  
10 **discriminated in violation of federal law."**

11           Now, as I understand it, the way the motion is phrased  
12 is to preclude testimony or argument to the effect that the  
13 violation itself means a violation of federal law, violation of  
14 a policy. And I think that's true. So to that extent I grant  
15 it.

16           But I think Walmart acknowledges that the evidence of  
17 their failure to follow the policy, their own policies, may be  
18 admissible to show intent or to show animus or, you know, on the  
19 part of the employee that maybe violated policy, things like  
20 that. And this may be an area where Walmart may want me to give  
21 a curative instruction to let the jury know that a violation of  
22 internal policies is not a violation of federal law. And the  
23 mere fact that Walmart may not have followed their internal  
24 policies, which go beyond federal law, or are not required by  
25 federal law, does not mean that the jury should find liability

1 under the ADA.

2 That I think would be probably the best way to handle  
3 that. And then there shouldn't be testimony or argument that  
4 this amounts to a violation of policy therefore it's a violation  
5 of federal law. I think the EEOC doesn't disagree with that, as  
6 I read their response.

7 **"4. Testimony or evidence relating to remote in time  
8 attendance records of non-similarly situated associates should  
9 be excluded at trial."**

10 And now, this one I -- I'm inclined to grant this with  
11 this understanding, if I understand it correctly. I think that  
12 ignoring late or absences or, you know, taking time off, things  
13 like that, could very well be relevant in this case.

14 But as I understand it, Ms. Spaeth was a sales  
15 associate. She was in the store part where, as long as the  
16 store is open, there's work to be done. Customers may need  
17 help. There's tasks to be done. Whereas the other employees  
18 were in an area where there was a set task. Once the task is  
19 completed they were told they could leave, by management. Yes?  
20 No?

21 MS. VANCE: Your Honor, I would speak to that and say  
22 no. Ms. Spaeth's early departures were with the understanding  
23 that her tasks were done. She had finished her returns, she had  
24 tidied her zone, and there was no work left so she could clock  
25 out early.

1           THE COURT: Okay.

2           MS. VANCE: Work is slow or no work left. I finished  
3 my work and so I could clock out early. Which is parallel to  
4 the testimony of the other hourly -- of Debbie Moss, one of the  
5 other hourly associates.

6           THE COURT: Okay. Mr. Emory or Mr. Buliox?

7           MR. BULIOX: Yes, Judge, if I can just offer just a  
8 little bit of context. And I think you were kind of spot-on  
9 there. We're talking about apples and oranges. We're talking  
10 about an employee in Ms. Spaeth who worked in the store, in the  
11 store part on the one hand, and on the other hand we're talking  
12 about employees who were in the back office in, you know,  
13 HR-type functions. One is a training coordinator and the other  
14 one is a personnel coordinator. Completely different  
15 supervisors, completely different responsibilities. Just a  
16 completely different, you know, situation all in all. And on  
17 top of that, we're looking at, you know, attendance records that  
18 go back to 2008.

19           THE COURT: Yeah.

20           MR. BULIOX: Six years, roughly, you know, since the  
21 time that Ms. Spaeth was let go and had her attendance issues  
22 that led to the end of her employment.

23           You know, EEOC talks about routine and, you know,  
24 things like that, but, you know, routine changes over time. And  
25 this is an employment case. In employment cases we look at

1 similarly situated individuals, and these people could not be  
2 any more non-similarly situated.

3 THE COURT: Okay. Ms. Vance?

4 MS. VANCE: Yes, Your Honor, if I may.

5 THE COURT: Sure.

6 MS. VANCE: We cited the *Ortiz* case in our response  
7 which speaks to this issue where in *Ortiz* the Seventh Circuit  
8 looked at the behavior of managers, people with various  
9 positions within the same company as *Ortiz*, to see whether the  
10 employer actually did penalize the behavior that it was -- that  
11 it argued that Mr. Ortiz was terminated for.

12 So this does go to the issue of whether the violation  
13 that Walmart says Ms. Spaeth was terminated for was actually  
14 something that Walmart terminated others for. And these people  
15 are not offered as, you know, job-to-job comparators.

16 THE COURT: It's not a summary judgment case.

17 MS. VANCE: Right.

18 THE COURT: That's the key here. I think comparators  
19 come in more on those types of cases.

20 Go ahead, Mr. Buliox.

21 MR. BULIOX: Yeah, sure. So I'm going to read you a  
22 quick line from the *Ortiz* case. It says:

23 "A juror also might infer that because of *Ortiz'*  
24 ethnicity one of his managers fired him for using techniques  
25 that were tolerated when practiced by other brokers."

1           The key word is "brokers." Ortiz was a broker, the  
2 other people were brokers that they were comparing largely.

3           THE COURT: Yeah.

4           MR. BULIOX: In this case we're comparing, again, a  
5 sales associate with HR people.

6           THE COURT: Yeah. I think, though, those kinds of  
7 distinctions can be brought out on cross-examination. And I  
8 think probably that's the way this needs to be handled. As well  
9 as the fact that we're talking different timeframes, we're  
10 talking changes.

11           But the argument here for, as I understand it, for a  
12 reasonable accommodation, is the question of whether it would be  
13 an undue hardship to provide that accommodation. And I think  
14 that it's arguable that these other employees were provided that  
15 accommodation.

16           Obviously there are distinctions in the jobs they  
17 held. That can be brought out. There's a difference in time.  
18 That can be brought out. But it does seem to me that that's the  
19 argument that the plaintiff is entitled to make here, and I  
20 think that'll go to the jury.

21           MS. VANCE: Thank you, Your Honor.

22           THE COURT: Yeah. Okay. So then next comes:

23           **"Bar all testimony, evidence and/or argument relating**  
24 **to, concerning or referencing certain statements of**  
25 **non-decisionmaker Karen Becker and Walmart not contacting Marlo**

1       **Spaeth's mother or sister to discuss any scheduling change."**

2                  Here again this goes to the interactive process, that  
3 full question of how you -- how an employer is required to  
4 address and accommodate an employee with a disability. And I  
5 think you're going to have to -- that I'm going to deny.

6                  Ms. Becker's testimony, that was her job really, to --  
7 as I understand it, to work out those kind of accommodations.  
8 And she was kind of left out of this process.

9                  So my understanding is that, again, would be  
10 admissible. And any -- any effects of it would be -- you know,  
11 the fact that she couldn't guarantee that talking would have  
12 made a difference, that's all argument, it seems to me, and so  
13 that evidence would be admissible.

14                 **"Evidence relating to availability forms for Marlo  
15 Spaeth and testimony or evidence relating to a misstatement in a  
16 position statement relating to those availability forms should  
17 be excluded."**

18                  Here again, that seems to bear on the manner in which  
19 the company dealt with Ms. Spaeth. I think it's admissible. I  
20 don't see unfair prejudice here. I think there's argument, but  
21 there's explanations both ways. I think there's a realistic  
22 argument that Walmart can make that those who had her sign  
23 weren't aware of or weren't sufficiently aware of her  
24 disability. But I think that's admissible.

25                 **"7. The Court should limit the testimony of**

1       **plaintiff's expert, Dr. Smith."**

2                  I agree Dr. Smith can't say that in his opinion  
3       Walmart violated the ADA. Walmart -- EEOC I think concedes that  
4       much.

5                  But I think the other things he's testified to are  
6       things I've already covered in the motion, the *Daubert* motion,  
7       and I intend to deny it and he can testify to that.

8                  MR. HARLAN: Briefly, Judge, can I just be heard on  
9       that issue?

10                 THE COURT: Yes.

11                 MR. HARLAN: So with respect to the earlier motion  
12       that we brought, the Court really didn't address the relevance  
13       issue. And we've kind of fine-tuned it in light of, you know,  
14       what is clear Seventh Circuit precedent if you look at the  
15       *Ekstrand* case which is really right on point here.

16                 We're talking about an individual who was clearly  
17       disabled. But what is not clear is whether there is a  
18       connection between some limitation associated with her  
19       disability and the supposed needs that were expressed to  
20       Walmart.

21                 And so that *Ekstrand* case is really important because  
22       it says that the duty to provide a reasonable accommodation  
23       isn't even triggered until there is some showing that the  
24       employer knew that what the employee was complaining about was  
25       really -- or asking about or asking for an accommodation for, is

1 connected to a limitation related to a disability.

2 So when Dr. Smith, after the fact -- so Dr. Smith is  
3 nowhere in the equation while Ms. Spaeth is employed at  
4 Walmart -- after the fact, is offering an opinion about this  
5 habit or groove that Ms. Spaeth was in. That's not anything  
6 Walmart could possibly be charged with understanding.

7 It's nothing that was even, you know, looking at the  
8 testimony in the light most favorable to the EEOC, nobody is  
9 saying that they presented any kind of medical information to  
10 Walmart to put them on notice that there was some connection  
11 between the behaviors that Ms. Spaeth was displaying and the  
12 limitations related to her Down syndrome.

13 And so Dr. Smith, now coming in 2021, talking about  
14 that issue, doesn't go to the central issue about reasonable  
15 accommodation because it's not anything Walmart could have  
16 possibly have known.

17 THE COURT: Ms. Vance, do you want to respond to that?

18 MS. VANCE: I'll defer to Attorney Mulaire.

19 MR. MULAIRO: I think I have this one.

20 Your Honor, I guess we respectfully disagree that the  
21 law is that demanding for an employee who needs an accommodation  
22 of a disability. I mean, the other cases are clear that there  
23 are no magic words for requesting an accommodation. And it's  
24 during the interactive process that an employer would be free  
25 to, you know, seek more information about whether or not there

1 genuinely is a connection between the disability and the  
2 requested accommodation or the need for an accommodation,  
3 whether some other accommodation might be appropriate.

4                   So attempting to put the cart before the horse and  
5 insist that the employee sort of provide -- especially an  
6 employee with an intellectual disability -- provide this sort of  
7 detailed medical information, sort of drawing that sort of link  
8 is not what the law requires.

9                   THE COURT: I think that's an argument I expect you to  
10 make to the jury, Mr. Harlan. And I -- I think that you have  
11 some -- you know, there's merit to it, but I don't think it is  
12 so clear that I can exclude this testimony.

13                  I think part of this might have come out in the  
14 interactive process. I think it's arguable that it was  
15 immediately apparent that the change of schedule upset a routine  
16 that she had had for 16 years and that the simple accommodation  
17 required would have been to just keep her at the schedule.

18                  Now, this -- I mean, does Walmart not have the ability  
19 to schedule workers at set times when -- I mean, I think this  
20 case is, in many ways, very interesting and very consequential.

21                  Walmart, like many employers who hire Down syndrome  
22 children, are viewed by many of us, many people, as really doing  
23 a gift, providing a gift, almost charity. Because Down syndrome  
24 kids -- I'm the father of a Down syndrome child, I know what  
25 this is like. And you appreciate the fact that they have a job

1 and the structure. And I don't know if that many employers gets  
2 all the work that they would out of someone without that kind of  
3 a disability.

4 You know, I think that the difficultly with this case  
5 is, you know, EEOC may win the battle and the effect for Down  
6 syndrome children may be very bad if employers say we're not  
7 going to do this anymore, we're not going to take this risk.

8 Now, on the other hand, you have the sheltered  
9 workshops that are providing structure for Down syndrome people,  
10 but the Department of Labor is insisting that they be paid  
11 minimum wage for those jobs and they can't afford to pay minimum  
12 wage in those jobs.

13 So anyone that looks at this, and has thought of it,  
14 is wondering, really, is this really benefiting Down syndrome  
15 children.

16 Now, those are policy issues that I recognize I don't  
17 have -- I mean, I'm to follow the law and I'm doing my best to  
18 follow the law. And I think those are important policy  
19 questions for people in a higher pay grade or a different pay  
20 grade perhaps than I.

21 Although I recognize that ultimately one of the  
22 questions in this case is whether or not Ms. Spaeth was a  
23 qualified person with a disability. I've concluded that's up to  
24 the jury, but we'll see what the evidence shows and consider all  
25 those things.

1           But I think at this point I think the evidence is such  
2 that this goes to the jury. And Dr. Smith's testimony that this  
3 is the kind of an accommodation that would have worked for this  
4 disability is something the jury will consider. And they'll  
5 also consider whether Walmart had any reason to suspect that  
6 that was the only accommodation required and whether or not it  
7 would have been an unreasonable hardship on Walmart, which is  
8 difficult to explain given the size of Walmart or everything  
9 else.

10           But, on the other hand, you know, like I said, Walmart  
11 and those companies that hire Down syndrome children often is,  
12 you know, I think a showing of goodwill and effort to build  
13 goodwill with communities. I think that's an important service.  
14 Now, whether or not this type of a case would act as a  
15 disincentive for that, I think that's a different question  
16 entirely. But I'm satisfied that at this stage this testimony  
17 is admissible.

18           MR. HARLAN: Just one further point, Your Honor, and I  
19 understand your ruling.

20           THE COURT: Uh-huh

21           MR. HARLAN: But it is important to look at that  
22 *Ekstrand* case because it does -- it's going to play itself out  
23 with respect to the jury instructions and the jury verdict form.

24           THE COURT: Yeah, I've looked at it.

25           MR. HARLAN: Okay.

1           THE COURT: And I understand what you're saying.

2       Yeah.

3           MR. HARLAN: I mean, I think the Seventh Circuit law  
4 is clear that the focus has to be on what the employer  
5 reasonably understood and knew at the time.

6           THE COURT: And I think that jury instructions is a  
7 good place to put that.

8           MR. HARLAN: Okay.

9           THE COURT: Because I'm saying that -- my ruling isn't  
10 that your argument is unreasonable.

11          MR. HARLAN: Okay.

12          THE COURT: It's just that it goes to that -- the jury  
13 is going to have to assess that aspect. And I will properly  
14 instruct them on the basis of the caselaw here.

15          MR. HARLAN: Thank you, sir.

16          THE COURT: Okay. We'll have a jury instruction  
17 conference once this trial gets underway. But I hope that you  
18 would give me -- especially instructions of this type that are  
19 focused on a specific issue and based on a Seventh Circuit  
20 precedent -- get me that and the citation and share those jury  
21 instructions back and forth and we'll be in a better position to  
22 address those when it comes time to finalize those.

23          I don't really get into the instructions until we're  
24 closer to the trial, to tell you the truth.

25          MR. HARLAN: Okay.

1           THE COURT: Too many cases go away. If I spent all my  
2 time preparing jury instructions of trials that settle I  
3 wouldn't have time to get done the other cases I have to do.

4           But I am aware of the importance of instructions in a  
5 case like this with significant caselaw. So please feel free to  
6 present those and give them to me before -- at least the week  
7 before. And both sides should. You know, and the authority  
8 you're relying on cited in the instructions is very helpful as  
9 well.

10          Ms. Vance?

11          MS. VANCE: Yes, Your Honor. In both pretrial reports  
12 submitted by both parties there are proposed jury instructions.  
13 Are you speaking now to a format different beyond the proposed  
14 jury instructions that were filed with pretrial reports that  
15 kind of have footnotes --

16          THE COURT: No.

17          MS. VANCE: -- with authority?

18          THE COURT: Those are good. Those are good.

19          MS. VANCE: Is that what you're looking for?

20          THE COURT: Yeah. Normally I'm seeing pattern  
21 instructions. These are additional instructions. And if you've  
22 already submitted those in the form of your proposed  
23 instructions, that's wonderful, that's exactly -- but I haven't  
24 gone over those in the kind of detail that I will as we get  
25 closer to trial.

1 MS. VANCE: Yes, Your Honor.

2 THE COURT: Okay.

3 So, that's Mr. Smith's opinions. Those are going to  
4 be admissible then.

5 "Bar testimony, evidence" --

6 MR. HARLAN: Your Honor, can I just ask you one other  
7 question about that motion?

8 THE COURT: Yes. Uh-huh.

9 MR. HARLAN: We also were asking about whether he  
10 ought to be able to give an opinion about testing. Because  
11 there's nothing in his CV that would suggest that he is a expert  
12 in the area of psychological tests or test administration. You  
13 know, he's basically a general practitioner, a medical doctor.

14 THE COURT: Uh-huh. And I think his -- my inclination  
15 is yes, but I'll look more closely at that. And the reason I'm  
16 thinking is that he has a good awareness, vast experience with  
17 Down syndrome people, people with Down syndrome. And so he's  
18 going to -- I think his testimony, as I understand it, is that  
19 the typical test for intellectual functioning requires -- it's  
20 not effective in measuring cognitive ability of people that have  
21 that type of disability.

22 And I think that that's probably something that even a  
23 layperson, but I think somebody especially with the experience  
24 of Dr. Smith with people with Down syndrome, is probably going  
25 to be in a -- has the kind of expertise, I would think, that

1 would allow him to give some opinion on that.

2 MR. HARLAN: Okay.

3 THE COURT: And I know there's another opinion --  
4 there's -- I know the EEOC is challenging Dr. Thompson's  
5 opinion. And I'm going to let both in, just so -- I mean, we're  
6 going to let the jury look at these and consider these opinions.

7 I'm not going to give a full decision on it today.  
8 And I'm still reading Dr. Thompson's opinion in the briefs. But  
9 my inclination is those are both going in, and I'll give you  
10 something in writing on Thompson's opinion before then. It  
11 seems to me he's measuring -- he's testifying as to cognitive  
12 ability or cognitive levels. And even though he doesn't have  
13 the kind of specialization in Down syndrome, we're talking about  
14 human beings, human beings -- intellectual capacity of human  
15 beings.

16 And, yes, Down syndrome is a disability that limits  
17 cognitive ability. And I think his ability to measure those  
18 things in people is relevant to this case, and I think it goes  
19 to a number of issues, so my inclination is that's going in as  
20 well. But we'll make a record on that at some later point.  
21 Okay.

22 **"Bar testimony, evidence or argument relating to or**  
23 **concerning referencing alleged retaliation."**

24 That's number 8. And my understanding is the EEOC  
25 does not oppose that. There's evidence that bears on the rehire

1 and that whole question. But you're not -- there's no claim for  
2 retaliation here and so there's not going to be argument or a  
3 claim for retaliation.

4 MS. VANCE: Yes, Your Honor, just to clarify.

5 The evidence overlaps.

6 THE COURT: Right.

7 MS. VANCE: But we're not going to present it as  
8 evidence of retaliation. It would be for the rehire and the  
9 termination.

10 THE COURT: Right. And I think it goes to intent or  
11 state of mind with respect to somebody who has this disability,  
12 is the argument.

13 MS. VANCE: Yes, Your Honor.

14 THE COURT: And I recognize that there's both sides of  
15 that.

16 **"9. All testimony, evidence or argument relating to  
17 associates other than Ms. Spaeth should be barred."**

18 This has to do with the -- is this the performance  
19 evaluations?

20 MS. VANCE: Yes, Your Honor.

21 THE COURT: I think I need to see those performance  
22 evaluations before I rule one way or the other on that.

23 MS. VANCE: And would you like to do that now,  
24 Your Honor?

25 THE COURT: Do you have them?

1 MS. VANCE: I have not the most legible copies once  
2 they're printed.

3 THE COURT: What specifically do you --

4 I mean, Mr. Harlan, was this directed at internal  
5 evaluations by Walmart as to how this incident was handled? Or  
6 Mr. Buliox, whoever has got this?

7 MR. HARLAN: Please give me one second, Your Honor.  
8 Let me just get to that.

9 THE COURT: Yeah.

10 MR. HARLAN: Yes. I think this was directed at  
11 certain performance evaluations of other individuals in terms of  
12 whether they got the constructive feedback on cooperation or  
13 other things that we believe that the EEOC will somehow try to  
14 offer in evidence in this case.

15 And I can't imagine how Walmart's evaluation of other  
16 employees on issues not having to do with EEO issues or  
17 diversity, I don't understand how that bears on the question of  
18 whether we discriminated against Ms. Spaeth.

19 THE COURT: I think I'm going to have to see the  
20 evidence before I know. And I assume -- you know, you  
21 understand you can't show a document to the jury without -- or  
22 even a witness without sharing it to the other side. And I  
23 think maybe the best way to handle this one is to talk to each  
24 other, bring this to my attention the morning of trial or some  
25 point and we'll look at that at that point.

1 MS. VANCE: All right. It is Plaintiff's Exhibit 42.

2 THE COURT: Okay.

3 MS. VANCE: And then, Your Honor, we would reserve the  
4 right in our equitable relief arguments following jury trial  
5 to --

6 THE COURT: Sure. Again, this is -- these rulings are  
7 only for the trial in front of the jury. And then:

8 **"Finally, the evidence and testimony relating to Marlo**  
9 **Spaeth's remote in time attendance infractions and the practice**  
10 **of non-decisionmakers ignoring Marlo Spaeth's attendance**  
11 **violations should be excluded from trial."**

12 And I'm going to deny that one. I think that goes to  
13 again the question of whether this was -- this would have been a  
14 reasonable accommodation, whether or not it would have been a  
15 hardship, that sort of thing. I think it goes to the jury and  
16 the jury has to assess those things. And they're entitled --  
17 the EEOC or plaintiff is entitled to present that evidence and  
18 have the jury assess it.

19 So those are my rulings, as I said, the preliminary --  
20 or the motions in limine rulings and hopefully that will give  
21 you some guidance and we can go from there.

22 I am not going to bifurcate the trial, damages from  
23 liability. I recognize the argument that the concern that the  
24 jury would be -- could be prejudiced and award -- that's always  
25 a possibility. It's the same jury that's going to decide it

1 anyhow. And it seems to me the evidence is going to be  
2 intertwined.

3 I understood the practice in the Western District, I  
4 guess before Judge Peterson, was that they often bifurcated  
5 cases. But that's not been my practice. And I find it much  
6 easier to do it -- and especially when I see the way the damage  
7 statute here works where back pay is treated as an equitable  
8 question. And then the other is --

9 And I think in terms of the fear of prejudice, I think  
10 that again is something jury instructions need to handle. The  
11 jury needs to be instructed that they're to decide this case on  
12 evidence and law, not on emotion or sympathy or prejudice.

13 And those are the types of things that I think you  
14 always worry about in a trial. But I think that jurors are  
15 typically aware of that and they're reminded of that. And I  
16 think that's -- there's no way to avoid it since you have the  
17 same jury that's going to decide liability decide damages. I  
18 think it just would prolong the trial or has the danger of  
19 prolonging it.

20 MS. VANCE: Thank you, Your Honor.

21 THE COURT: Uh-huh. So, and then, as I've indicated,  
22 I am going to deny the motion to exclude Dr. Thompson's  
23 testimony, but I want to issue a decision on that in a little  
24 more detail.

25 So. Oh, there's a motion to quash the subpoena that

1 just came in today. And I don't have a response to it and I'm  
2 not sure. Is Ms. Spaeth receiving Social Security disability?

3 MS. VANCE: Yes, Your Honor, she has her entire life.

4 THE COURT: Okay. Oh, so she's never made more than  
5 necessary to qualify for Social Security disability.

6 MS. VANCE: Exactly, Your Honor.

7 THE COURT: And as I understand the law in this area,  
8 that doesn't preclude a claim for ADA because of the additional  
9 requirement of providing a reasonable accommodation. And so  
10 that doesn't preclude it, this claim here. I don't know --

11 MR. HARLAN: No. I mean, we -- Your Honor, I'm sorry  
12 to interrupt.

13 THE COURT: Go ahead, Mr. Harlan.

14 MR. HARLAN: So just -- and I understand you haven't  
15 reviewed the EEOC's motion, and I think we can give you our  
16 response to it now and save everybody some time.

17 THE COURT: Sure.

18 MR. HARLAN: They have moved to quash our subpoenas  
19 for Social Security records, the hospital records, and the  
20 EEOC's file relative to the retaliation claim. I think the  
21 first argument is discovery is closed, we're not entitled to it  
22 because we didn't ask for it in discovery.

23 Well, we did ask for records in discovery relative to  
24 the hospital records and the Social Security records. There was  
25 resistance I think to the medical records, and I think you had

1 to intervene and direct that they would sign an authorization so  
2 that we could get the records.

3 So we did diligently pursue both the Social Security  
4 records and the medical records during discovery. We received  
5 documents I think through 2018. And all we simply have asked is  
6 that both the Social Security Administration and the hospital  
7 produce updated records. Discovery in this case closed in 2019.

8 THE COURT: Yeah.

9 MR. HARLAN: It's 2021.

10 THE COURT: Right.

11 MR. HARLAN: So even if we had exercised the utmost  
12 diligence, we couldn't have gotten up-to-date records before the  
13 close of discovery.

14 Moreover, completely lacking in EEOC's response is any  
15 indication of prejudice. They have not indicated how these  
16 records are prejudicial, how they won't have sufficient time to  
17 look at them and see if, you know, there's anything there that  
18 they need to prepare for.

19 With respect to the hospital records, we actually have  
20 the records. In response to the subpoena they produced the  
21 records and we've already given those records to the EEOC.

22 With respect to the EEOC file, that's a little bit of  
23 a nuanced law review type of argument. But the bottom line is  
24 that we're the same parties to the charge; right? So there was  
25 a retaliation charge filed against Walmart during the course of

1 this case, and we're simply asking for the records to see if  
2 there are any admissions in there that might be helpful to our  
3 case.

4                 The EEOC is citing some statute and rules in their  
5 internal guidance that indicates that general members of the  
6 public can't get those files. Well, we're not a general member  
7 of the public, we're a party to the charge that was filed.  
8 Where the respondent Ms. Spaeth, I think through her sister, was  
9 a charging party. And this went on for a couple of years until  
10 there was a decision made that they were not going to amend  
11 their complaint and bring a retaliation claim.

12                 Again, you know, the EEOC -- you know, this is not  
13 like some third party. They have the records and there is no  
14 good reason why they can't disclose the records. They've had  
15 them for the entirety of the time that the charge has been  
16 pending.

17                 THE COURT: Mr. Mulaire?

18                 MR. MULAIRO: We can't disclose the records because  
19 it's against the law. So that would be the reason. But the  
20 citations are provided in our motion.

21                 But with respect to the charging party or a respondent  
22 under the regulations promulgated by the Commission -- which the  
23 Supreme Court, we provided the authority in the motion, has  
24 recognized the law that governs these sorts of disclosures --  
25 even the parties to the charge are the public except under

1 certain circumstances where there either is litigation arising  
2 out of the charge or, in a narrow exception, when the charging  
3 party is during the window where they can consider litigating  
4 the charge. Outside of those time periods there are  
5 confidentiality interests that the regulations serve --  
6 regulation is designed -- there's sort of a reliance interest.  
7 People submit things to the EEOC knowing that there's this  
8 statutory scheme in place and a regulatory scheme such that  
9 these things won't all simply be released at the end of the  
10 investigation unless they're needed for litigation that arises  
11 out of the charge.

12 So the citations are in the brief. But the rules are  
13 clear, this is then the agency's rules which we are obliged to  
14 follow. And they've been the rules for a long time. When we  
15 have to litigate it we do.

16 I can't say, you know, the agency has never lost it in  
17 court, but, I mean, in my experience when we've had to litigate  
18 it our view is typically sustained.

19 So it's contrary to the regulations which govern here.  
20 The EEOC has the statutory authority under Title VII to set  
21 procedural rules about disclosures, and these are the rules that  
22 apply to everybody and have for a very long time.

23 Oh, and that's with respect to the retaliation  
24 investigation file. With respect to, you know, the other things  
25 that they're seeking through trial subpoenas, you know, if they

1 wanted materials after 2018, a lot of time has passed since 2018  
2 and so whatever force the argument has that, you know, they have  
3 a need for updated records, they could have sought those  
4 sometime more than two or three weeks before trial.

5                 The prejudice is that we have a little bit of work to  
6 do. We have a trial coming up in a couple of weeks. And the  
7 prospect of hundreds of pages of new records now showing up for  
8 us to sort of synthesize and anticipate -- not just what do we  
9 think their significance is, but what, you know, ideas might  
10 these inspire in our opposing counsel -- that is prejudice  
11 because we at this point should be focusing on the evidence that  
12 was properly disclosed during discovery, not reams of new  
13 evidence.

14                 THE COURT: Well, you have an obligation, every party  
15 has, to supplement discovery requests. And is this more than a  
16 supplementation of previously made discovery requests?  
17 Especially, Mr. Harlan says they already have the hospital  
18 records. And I don't know if there's anything that's of use to  
19 him there, but that's what he's looking for for Social Security  
20 too, if there's any update. And I assume there's not much.

21                 But it doesn't sound to me like that's an unusual  
22 request given the amount of time that has passed as a result of  
23 the delays of the trial. Because, I mean, we've been -- I think  
24 our trial was originally scheduled for last March and, you know,  
25 we had a year delay here. So I would think you should

1 supplement any -- or they should have a right to supplementation  
2 of records.

3 MR. MULAIRO: I mean, typically the supplementation  
4 applies to the parties. I mean, these are records from third  
5 parties. So I guess I would just reiterate that if they wanted  
6 additional records from third parties, they should have done  
7 that more than, you know, a couple of weeks before trial. I  
8 mean --

9 THE COURT: And then supplement again in case there's  
10 more that happened in the -- just before trial? I mean, there's  
11 an ongoing responsibility. I expect if there's anything in  
12 those records your client let's you know if she returned to the  
13 doctor, has some changes in her condition, that should be passed  
14 on. That's part of -- isn't that part of the process?

15 MR. MULAIRO: Yes. I mean, with any trial there's  
16 always going to be, you know, some point in time between when  
17 discovery stops and trial. So, I mean, I'm not -- I'm trying to  
18 advocate the view that, no, no matter how long a period of time  
19 no one's entitled to know what goes on in-between.

20 But, you know, discovery ended in 2019, they're saying  
21 some of the records they have trailed off in 2018. There was a  
22 lot of time before now to seek supplementation. If it were the  
23 case that, you know, well, they're missing the last six weeks of  
24 records, that would be a very different story.

25 Here, I mean, apparently there's already 341 pages

1 that we've gotten. I don't know how much more is on the way.  
2 If they wanted to get several years' worth of materials, it  
3 should have happened before now. It's prejudicial to have to  
4 digest all of that during the remaining two or three weeks  
5 before trial when --

6 THE COURT: Well, in terms of Social Security, has  
7 there been any change other than just she's receiving payments?  
8 I mean, has there been any case, any activity, any hearing, any  
9 change in her condition?

10 MS. VANCE: Not that we know of, Your Honor. The  
11 first time we knew there were Social Security Administration  
12 documents in this case at all was Tuesday.

13 THE COURT: Didn't you know she was receiving Social  
14 Security? So there had to have been an adjudication or --

15 MS. VANCE: Yes.

16 THE COURT: Yeah.

17 MS. VANCE: But there have been no documents in this  
18 case until 48 hours ago --

19 THE COURT: Yeah.

20 MS. VANCE: -- from the Social Security  
21 Administration.

22 THE COURT: And what are those documents, just payment  
23 records or --

24 MS. VANCE: They're the payment records.

25 THE COURT: Yeah. Are the payment records relevant

1 here?

2 MS. VANCE: I'm not offering them, Your Honor.

3 THE COURT: Yeah. Mr. Harlan, what are those --

4 MR. HARLAN: Yeah, so, Your Honor, we haven't made a  
5 final decision in terms of whether the payment records that are  
6 part of the Social Security documents are, you know, available  
7 for an offset. We are looking at that issue.

8 But more important are I think filings from  
9 Ms. Stevenson that are contained in the records about  
10 Ms. Spaeth's condition. And so I think that is really the great  
11 utility of the records for our purposes.

12 So that's why we asked for the records, we received  
13 them, we've turned them over to EEOC, I think they have them.  
14 And, you know, we're just simply asking for some additional  
15 records since the last time we received the production.

16 THE COURT: You've gotten the hospital records; is  
17 that right?

18 MR. HARLAN: We have the hospital records. The  
19 EEOC --

20 THE COURT: So the motion to quash is too late, you  
21 already have that.

22 MR. HARLAN: Yes.

23 THE COURT: And the Social Security -- I assume  
24 whatever the hospital would say is what they would -- or  
25 Ms. Stevenson would send to Social Security if it's at all

1 relevant. I mean, what would Social Security have that might  
2 bear on this at this point?

3 MR. HARLAN: Well, what we saw in the original set of  
4 documents we received -- and there are not a lot. They're  
5 pretty minimal. I think as a condition of getting those  
6 payments the guardian has to provide certain reports about the  
7 condition of Ms. Spaeth and certain activities that she's  
8 engaged in during a particular period of time. And so that  
9 might be useful to us, for instance, on the issue of damages.

10 To the extent the testimony is that Ms. Spaeth is  
11 completely incapacitated, the termination has caused her not to  
12 have any kind of social activity, et cetera, et cetera,  
13 et cetera, filings by Ms. Stevenson that contradict that I would  
14 think would be extraordinarily relevant and appropriate for the  
15 jury to hear.

16 MR. MULAIRO: So, Your Honor, it sounds like these may  
17 be records from prior to the end of discovery -- or prior to  
18 discovery ending. These aren't, you know, supplemental things.  
19 I mean, they've come in very recently. I myself haven't had a  
20 chance to see them. But, I mean, these sound like things that  
21 are not just from within the last year or so.

22 So, I mean, to the extent the justification for  
23 seeking some of this stuff was how it's supplementing to get  
24 more recent documents. It sounds like they go back further in  
25 time than that. This is something that the defendant could have

1 gotten and explored during discovery but instead we're getting  
2 it now.

3 THE COURT: Mr. Harlan?

4 MR. HARLAN: You know what, Your Honor, I tell you  
5 what, we don't want to waste your time on this. We can't even  
6 get the Social Security records anyway. So, in fact, we were  
7 anticipating that the U.S. Attorney's Office might be here  
8 objecting. They have basically indicated in response to our  
9 subpoena that unless you order them to turn over the records,  
10 they're not giving us anything beyond what we have already.

11 So I think we'll withdraw the subpoena for the Social  
12 Security records. I think you are inclined to let us continue  
13 to have the hospital records that we received and turned over to  
14 the EEOC, as long as we can use those we are satisfied.

15 THE COURT: Yeah. If there's a complaint of prejudice  
16 because records come in, but it seems to me that these are  
17 hospital records relating to her condition, that would seem to  
18 be admissible.

19 And, you know, if there's something extraordinary  
20 different and EEOC feels they need more time, the last thing I  
21 want to do is adjourn this case. I don't think you want me to  
22 either. So I don't see that happening. But, in any event,  
23 we'll just leave that where it lies.

24 MR. HARLAN: Thank you.

25 THE COURT: In terms of the retaliation file, I'll

1 take a look at these citations. If you want to send anything,  
2 Mr. Harlan, for me to look at in response to this motion, I'll  
3 look at that too and we'll issue a decision on that.

4 You know, I wonder, I mean, is there anything there?  
5 Are we -- I hate to go through all this if there's nothing there  
6 anyhow. Is there anything that you feel you're withholding or  
7 that Mr. Harlan might want, or is that too dangerous a question  
8 to answer on the record? We have all these rights and it turns  
9 out there's never anything there.

10 MR. MULAIRO: Yeah. I mean, you know, we're somewhat  
11 constrained. This isn't just the trial team deciding we don't  
12 want to disclose this, this is the Commission's rules which  
13 we're obliged to uphold.

14 THE COURT: Yeah.

15 MR. MULAIRO: So I feel a little constrained as to how  
16 much I can say. But, no, I don't think our opposing counsel  
17 would be super excited if they got this.

18 THE COURT: Okay.

19 MR. MULAIRO: But, you know, I can't --

20 THE COURT: Well, I will look at your motion and then  
21 I'll look at anything Mr. Harlan gives me and we'll give you a  
22 decision on that as well.

23 Okay. So, we're set for trial then on July 12th. And  
24 you anticipate we'll get through this in a week?

25 MS. VANCE: Four days, Your Honor.

1           THE COURT: Good. Things go quickly in this court.  
2 We pick a jury pretty fast. I do the voir dire. And then once  
3 I ask questions I usually have counsel approach and we'll --  
4 before I release anyone for cause or anything I get your input.  
5 If there's anybody I haven't excused that you think should be  
6 excused for cause, you can tell me at that point.

7           Any follow-up questions that you want me to ask you  
8 can ask then at the side bar. We'll put all that on the record  
9 later as soon as the jury is picked.

10          But my practice, especially in civil cases, is we're  
11 usually doing opening statements and even a witness in the  
12 morning yet. So it goes quick. You'll get my full attention.  
13 I get rid of other -- we don't interrupt with a sentencing here  
14 or things like that. So we'll push things off that we can push  
15 off. Whatever we can't push off like initial appearances in  
16 criminal cases, things like that, we'll do those over the noon  
17 hour. Or these days we're doing them by Zoom and the magistrate  
18 judge that handles this court will do it on the office computer  
19 probably.

20          So I think you're going to get our full attention.  
21 We'll give you full days. We'll take our normal recesses,  
22 midmorning, midafternoon. We'll end at about 5:00. If you have  
23 a witness or if we get behind we might have to go later. If you  
24 have a witness you need to finish we could go later. But  
25 typically I'm not -- you know, I don't keep people here after

1       5:00 during trials. And we start at 8:30 or 9:00, depending on  
2 where the jury's coming from.

3                  Let's see. What else?

4                  MR. HARLAN: One issue -- and this is really directed  
5 to the EEOC. We notice in some of the recent filings that there  
6 is nothing about the terms and conditions claim, so I'm assuming  
7 the EEOC is withdrawing that claim? It wasn't in the jury  
8 instructions, it wasn't on the verdict form. Because I thought  
9 there was a claim about unfair discipline, that that was an  
10 independent claim that they were making.

11                 MR. MULAIRO: Yeah, there was some reference to terms  
12 and conditions in I think the opening paragraph of our  
13 complaint. But the enumerated claims there and, in any event,  
14 the ones that we propose to submit to the jury, are the ones in  
15 our proposed verdict form.

16                 MR. HARLAN: Okay.

17                 MR. MULAIRO: Discipline really leads up to the  
18 termination so the question really is the termination. We're  
19 not going to try to present a claim about the write-up on  
20 December whatever 2014.

21                 MR. HARLAN: So that was expressly in the lawsuit that  
22 was filed.

23                 THE COURT: Uh-huh, sure.

24                 MR. HARLAN: And it was in a charge. And so I don't  
25 know if on the record they are withdrawing that specific claim,

1 but I think it would probably be good to have some clarity about  
2 it.

3 MR. MULAIRES: The only three claims that we are  
4 pursuing are: the failure to accommodate, the discharge, and  
5 the failure to rehire.

6 MR. HARLAN: Okay. And so that other claim is  
7 dismissed.

8 THE COURT: Okay.

9 MR. HARLAN: Thank you.

10 THE COURT: Okay. Anything else that we need to  
11 address today?

12 MS. VANCE: Yes, Your Honor. We did have a few  
13 questions to help us as we prepare, questions of clarification.

14 For opening statements, does this court set any kind  
15 of deadlines for the parties to exchange or disclose evidence or  
16 demonstrative aids to be used during opening?

17 THE COURT: Well, you can use demonstrative aids, but  
18 show it to the other side first and if there's an objection I  
19 need to rule on it. But I haven't -- I mean, if there's  
20 something that you think might be controversial, let them know  
21 right away and then send me whatever you have that is in  
22 dispute.

23 MS. VANCE: Yes, Your Honor.

24 THE COURT: Nothing obviously can be shown to the jury  
25 unless it's by agreement of the parties or received into

1 evidence. Okay?

2 MS. VANCE: And specifically with respect to showing  
3 any deposition excerpts or deposition videos, then that would be  
4 precluded at opening; correct?

5 THE COURT: At opening? Unless everyone's confident  
6 this is going into evidence and -- you know, yeah, I wouldn't go  
7 with that sort of thing. Obviously you can say you'll hear this  
8 evidence and see this evidence or whatever, however you do it,  
9 and then --

10 MS. VANCE: Then, Your Honor, for closing statements  
11 is plaintiff allowed rebuttal closing?

12 THE COURT: Plaintiff is granted rebuttal.

13 MS. VANCE: Thank you. Then we would ask, can we be  
14 permitted to have one attorney do closing but another attorney  
15 do the rebuttal closing?

16 THE COURT: Yes.

17 MS. VANCE: And during closing may we refer to jury  
18 instructions and the verdict sheet?

19 THE COURT: Yes. In fact, I often hand out a copy of  
20 the verdict to the jurors so they can follow along with your  
21 argument.

22 MS. CARTER: Then for examination of witnesses,  
23 Your Honor, we do intend to call some witnesses adversely during  
24 our case in chief. So then how will those examinations proceed?  
25 Once they go to cross, are we objecting beyond the scope of

1 direct if the cross-examination of the really Walmart witness,  
2 defense witness is --

3 THE COURT: I typically like to get the witness on and  
4 then off and done. So I would prefer -- unless Walmart wants to  
5 separate the cases and present that testimony separately, I  
6 would prefer that they go through whatever questions they have  
7 of that witness. So we would not limit the cross to the same  
8 topics. It would be if there's other topics they would go forth  
9 and call that witness or examine that witness in whatever way  
10 they wish to. But if they choose to put it on later, they can  
11 do that.

12 MR. MULAIRO: I think the EEOC would also -- our  
13 concern is that one or two of the adverse witnesses may really  
14 have quite a large role in the defense's case-in-chief, and we  
15 would prefer that half their case-in-chief not happen in the  
16 middle of our case-in-chief.

17 And so, this isn't going to be a lot of people,  
18 there's two -- two in terms of the live witnesses. So, I mean,  
19 I guess --

20 THE COURT: And you have very brief parts to get in;  
21 is that what you're saying? Or --

22 MR. MULAIRO: I think compared to what we would  
23 anticipate the defendant would do, I think ours is probably  
24 shorter.

25 THE COURT: Are these all local people?

1 MS. CARTER: Manitowoc local, Your Honor.

2 THE COURT: Yeah. Mr. Harlan, what's your view?

3 Mr. Buliox?

4 MR. BURNETT: This is Mr. Burnett. I tend to agree  
5 with the Court that we put on witnesses once and only once. And  
6 if the opposing party thinks we're beyond where we ought to be,  
7 that's an appropriate time for an objection. But to try to  
8 prescript a trial is an impossible job I think.

9 THE COURT: Yeah. I think -- let's see where it goes.  
10 I mean, if the -- if Walmart begins to take all of your time and  
11 shift the focus, we can revisit. But if -- I don't want to  
12 bring a witness back, even if it's only from Manitowoc, if we  
13 don't have to. I think it's a more efficient use of our time to  
14 get that witness done and be done with it. Now, there are  
15 exceptions and certainly we can revisit that if it looks like  
16 this is interfering in your ability to present your case in any  
17 kind of rational and reasonable manner.

18 MS. CARTER: And just to clarify, Your Honor, if we  
19 call a Walmart witness adversely and then Walmart does proceed  
20 with their full basically direct examination of that witness, we  
21 would then have the opportunity to cross that witness.

22 THE COURT: You bet. You bet. You can cross that  
23 witness then too, sure. I would hope we could finish with that  
24 witness completely.

25 MS. CARTER: Thank you, Your Honor.

1                   THE COURT: Uh-huh.

2                   MR. MULAIRO: I'm sorry, just one other question. On  
3 adverse witnesses different judges prefer different levels of  
4 formality and detail in terms of setting up that the person is  
5 an adverse witness. I mean, these are individuals who were in  
6 managerial roles at Walmart. So I think we also wanted to know  
7 is that enough, or do we need to have sort of a preliminary  
8 examination to establish --

9                   THE COURT: No. If they're a Walmart employee,  
10 unless -- you know, I assume Walmart's not challenging your  
11 claim that they're adverse. If there's a dispute there let me  
12 know. But I can't imagine a -- well, I can imagine actually  
13 there's some disgruntled employees, I imagine Walmart has some,  
14 but if that's the case let me know.

15                  MR. MULAIRO: Thank you.

16                  THE COURT: Yeah.

17                  MS. VANCE: Your Honor, I wanted to ask next about  
18 sequester of witnesses.

19                  THE COURT: If you move to sequester that's automatic,  
20 they're sequestered.

21                  MR. HARLAN: Your Honor, can I speak to that? The  
22 only --

23                  THE COURT: Yeah. Let me finish. Ms. Vance, did you  
24 have something more?

25                  MS. VANCE: Yes, Your Honor. The legal guardian of

1 Marlo Spaeth, her sister, Amy Jo Stephenson, is with her a lot  
2 and with her during any situation that would cause stress such  
3 as coming to court. And we would ask permission to stray from a  
4 typical sequester to allow, if Marlo is called to testify,  
5 Ms. Spaeth is called to testify, that her legal guardian be  
6 allowed in the room?

7 THE COURT: I would consider her a party. Mr. Harlan,  
8 do you oppose that?

9 MR. HARLAN: Yeah, we wouldn't have any opposition to  
10 that.

11 THE COURT: Yeah. And what was your question?

12 MR. HARLAN: So this is -- I understand the Court's  
13 preference on sequestering witnesses. This is a little bit  
14 different, though, but I think the record is pretty clear that  
15 there's been some diminution in Ms. Spaeth's capacity.

16 And so to the extent she has -- to the extent she's  
17 going to testify and is going to project herself in such a way  
18 to the jury that they may think the way she appears and is able  
19 to respond at trial is how she appeared when she worked for  
20 Walmart, I would think it would be appropriate to have some of  
21 our witnesses observe her in terms of her ability to answer  
22 questions, how she is interacting with the lawyers, and then  
23 when they are called be able to say, hey, I witnessed her in the  
24 courtroom today and that's not how she was when she worked at  
25 Walmart.

1           I think it would be unfair to us, given the facts of  
2 this particular case, to have her get up on the stand and she  
3 can't answer basic questions when that wasn't the way she was  
4 back in 2015 when this all happened.

5           THE COURT: Okay. It's an interesting argument, but I  
6 don't think it changes the sequestration rule. I think they can  
7 describe how she appeared when they worked with her, that's  
8 fine, but I don't think we're going to have them listen to her  
9 testimony.

10          And from what I can tell it doesn't sound -- I guess  
11 it doesn't sound like she's suddenly going to be able to project  
12 an entirely more positive -- if anything from what I've heard is  
13 she's declined since she was working at Walmart. So I don't  
14 think --

15          MR. HARLAN: That's the point, Your Honor. So the  
16 concern would be the jury is going to look at her at trial and  
17 see how she appears and maybe improperly assume that that's how  
18 she was at -- when she was at Walmart and, therefore, think  
19 differently about what Walmart should have considered or assumed  
20 about her need for an accommodation. So that's the concern from  
21 our standpoint is --

22          THE COURT: You know, I can see how that would benefit  
23 you and how it would benefit EEOC, how it would be a detriment  
24 to them to look at her now. I mean, they may look at her now  
25 and conclude she's not a qualified employee with a disability,

1 because she may not be now, but the argument is she was then  
2 and, in fact, she may have deteriorated from what I'm hearing.  
3 Am I missing something here? I just don't think --

4 MS. VANCE: Yes, Your Honor, it is in dispute that  
5 there's any deterioration. The dementia diagnosis our expert  
6 believes was a misdiagnosis. His differential diagnosis was  
7 pseudodementia because of depression.

8 THE COURT: Right. But doesn't he agree that because  
9 of her depression she's declined from her level that she was at  
10 the time she worked at Walmart?

11 MS. VANCE: That is not in his opinions.

12 THE COURT: Okay.

13 MS. VANCE: And there's a prescription for depression.

14 THE COURT: Okay.

15 MR. MULAIRO: May I add, though, I mean, I would say,  
16 as the Court noted a moment ago, their witnesses are free to  
17 describe within the bounds of evidence what they witnessed in  
18 2015 or 2014. I think that's the right approach.

19 You know, the reasons that sequestration is normally,  
20 you know, granted are precisely that witnesses don't ordinarily  
21 come and then sort of comment on the testimony of other people.  
22 I mean, not just with respect to credibility but in general,  
23 it's the jury's job to, you know, evaluate the witnesses, not  
24 other witnesses.

25 THE COURT: And, of course, to prevent them from

1 conforming their testimony to what they hear and that sort of  
2 thing.

3 MR. MULAIFFE: Of course.

4 THE COURT: So I think the sequestration order limits  
5 you to having a representative of your client and whoever you  
6 designate as the representative can certainly be in court, but  
7 beyond that I think we're limited. So I will order then --  
8 grant the motion to sequester witnesses. This is Rule 615.

9 MS. VANCE: Thank you, Your Honor.

10 THE COURT: And it's pretty much mandatory as I read  
11 it.

12 MR. BULIOX: So, Judge, I have a few quick I guess  
13 logistical questions. One, for opening statements and closing  
14 statements, do you place time limits?

15 THE COURT: No. Again, that's one of those things  
16 that I figure the smart attorneys don't need me to limit them.  
17 And I don't know your case well enough, but my experience is  
18 I've never had a problem with not limiting. I think attorneys  
19 are smart enough to not waste everyone's time.

20 MR. BULIOX: Okay. And in terms of witness  
21 examinations, are we going to set up at the podium over there?  
22 Is that going to be -- or do you --

23 THE COURT: The podium -- this is such a small  
24 courtroom and if we put that podium in then we're blocking  
25 jurors' views. So you're going to have to question -- you can

1 stand at the table. You don't have to be right down talking  
2 into a microphone. We pick things up. I think we'll have a  
3 court reporter. We've done this -- like today we're on  
4 recording. But the reporters enjoy being here for trials  
5 because they're in a better position to make sure the record is  
6 clear. But you can question from counsel table.

7 MR. BULIOX: Thank you.

8 MS. VANCE: Your Honor, I wanted to ask about  
9 publishing exhibits to the jury and whether or not there's a  
10 requirement for a sponsoring witness to lay the foundation of  
11 every exhibit and in particular exhibits that would be admitted  
12 under a Walmart records custodian or exhibits which the parties  
13 have stipulated the authenticity of.

14 THE COURT: Yeah.

15 MS. VANCE: And I have some specifics.

16 THE COURT: Well, let me just say this.

17 MS. VANCE: Okay.

18 THE COURT: If you stipulate, whatever you stipulate  
19 to you can show to the jury. If there's a dispute as to  
20 admissibility, get me to rule on it before you show it to the  
21 jury. I would hope that anything that the only issue is  
22 authenticity and you can avoid custodial testimony, I would hope  
23 you'll work those things out so that we don't have people coming  
24 in and saying, yes, this is an authentic record of regularly  
25 kept records at Walmart or something like that.

1 MS. VANCE: And then the logistics, Your Honor. If I  
2 have an exhibit and I don't have a witness in our witness stand  
3 directing the jury's attention, you would just do that from  
4 counsel table to the exhibit, to the screen, Your Honor?

5 THE COURT: Sure. Uh-huh.

6 MR. MULAIRO: Could I just clarify on the exhibits, we  
7 do plan to talk with opposing counsel and had a very brief  
8 discussion the other day about seeing whether we can stipulate  
9 to the authenticity of things and whether there are things that  
10 we can -- the parties can agree are just admissible.

11 But to the extent there are things where there are no  
12 questions of authenticity but we haven't agreed on  
13 admissibility, I'm envisioning some things that we don't really  
14 need a witness to provide anything further in order to move them  
15 into evidence. I guess we're wondering like do we need to find  
16 a witness to mouth some words about something? Or can we, at  
17 the beginning of the court day before the jury comes in, move  
18 something into evidence if we think that there's an adequate  
19 basis for it but we for whatever reason haven't agreed with  
20 opposing counsel about that?

21 THE COURT: Sure. I mean, I appreciate -- you know,  
22 normally we'll have the attorneys come at 8:30, especially when  
23 there's -- and then I like to take up matters then. Maybe we'll  
24 have the jury come at 9:00 or quarter to 9:00 and take up those  
25 types of things then.

1           MR. MULAIRO: Okay, thank you.

2           THE COURT: Yeah.

3           MS. VANCE: That was my list, Your Honor.

4           THE COURT: Good. Anything further from Walmart?

5           (No response.)

6           THE COURT: Okay. Well, like I said, I find this is a  
7 very interesting case. I recognize it's a very important case  
8 for both parties and we have a way of resolving it, at least at  
9 this level, and then from there we go.

10           (General laughter.)

11           THE COURT: Of course, you always have that option of  
12 settling the case. If you reach that, let us know. We don't  
13 mind whenever you tell us. The sooner the better, but that way  
14 none of us make mistakes here.

15           MR. MULAIRO: I apologize, I did think of one other  
16 question that we had. We had a short tour of the court  
17 yesterday, and I know that there are two rooms back there that  
18 the parties -- that counsel will be able to use. Is it possible  
19 for our witnesses to also wait there rather than just in the  
20 hallway?

21           THE COURT: Yes. We'll arrange that. You know, what  
22 we've done during COVID times when we've had trials is we've  
23 live streamed it to limit the number of people in the courtroom.  
24 And we want to make sure we don't live stream it to witnesses.

25           So caution your witnesses that if we are still live

1 streaming, which is kind of different for federal courts, but  
2 we're going to have to make sure your witnesses don't see that.

3 One of the first trials we had during COVID, last  
4 September we did one, and we actually live streamed it into that  
5 large room there for purposes of just making sure public had  
6 access. Public access is -- kind of outweighs our desire not to  
7 share photographs of court proceedings.

8 But anyhow, in the next month I'm hoping this mask  
9 mandate will be entirely voluntary all the time. And then I'm  
10 thinking if I can get rid of some of this plexiglass, I'd like  
11 to do that, too. I see you took out the dividers, you're  
12 welcome to do that.

13 MR. MULAIRO: We hope that's okay.

14 THE COURT: Well, that's fine. Yeah.

15 MS. VANCE: Your Honor, I think we probably should  
16 have that on the record, we have a formal request that our  
17 counsel table not be divided, not be set up with the plexiglass.

18 THE COURT: Fine. We'll keep those away.

19 MS. VANCE: Thank you.

20 THE COURT: That's fine. Okay. Anything else?

21 (No response.)

22 THE COURT: All right. Well, thank you, all. We'll  
23 get something out on these last two things and get ready to go.  
24 And we're already taking a good look at it and will be ready for  
25 the 12th.

1 MS. VANCE: Thank you, Your Honor.

2 THE COURT: All right. Court' adjourned then.

3 (Hearing concluded at 3:03 p.m.)

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C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified June 25, 2021.

/s/John T. Schindhelm

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